Filed 3/30/04

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re LESLIE VAN HOUTEN on Habeas Corpus.	E032032 (Super.Ct.No. SWHSS 5072) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

The opinion filed in this case on March 1, 2004, is modified as follows:

(1) On page 3, on line 13, delete the number "15" and insert the number "17."

(2) On page 5, at end of the first paragraph, after the sentence ending "(*Id*. at pp. 128-130, 205.)," add as footnote 2, the following footnote, which will require renumbering of all subsequent footnotes:

> [2]In Van Houten's petition for rehearing, she objects to our statement that she shared Manson's beliefs justifying the murders. As pointed out in the petition, for our statement we rely on *People v. Manson*, *supra*, 61 Cal.App.3d at pages 128-130, 205, which reflects the evidence from the first trial in 1971. The jury in that trial did not hear the psychiatric testimony introduced in her second trial in 1977 and her third trial in 1978 that, as Van Houten says in the rehearing petition, she had not been "capable of meaningfully reflecting on the gravity of the contemplated acts, and that the Manson cult was not an ordinary criminal gang involved in a conspiracy." Indeed, in response to this evidence, it is plausible to infer that the reason the

People in the third trial requested and received a felony-murder instruction was to avoid the possibility of another hung jury as occurred in the second trial.

Nevertheless, the Board found that Van Houten shared the same intent as her codefendants in committing the murders. Our statement reflects that finding, which finds support, for example, in Van Houten's testimony at the parole hearing described in the text following this footnote (*post*, p. 6) that "she was crazy enough to believe in [Manson] and what he was doing . . . ." The Board had before it the opinion of Van Houten's and the Board's experts, but still found, for example, that "there was an intent on the part of the inmate and her crime partners to make this look like . . . a racial killing . . . in order to perpetuate the helter skelter as it was described by Charles Manson . . . ." As established in our discussion of the standard of review in this case (*post*, pp. 10-11), the Board is not limited by what the juries in the second and third trials did or did not decide, and we could not reverse if the record in this case contained, which it does not, evidence of suitability far outweighing the evidence of unsuitability.

(3) On page 5, the first and second full paragraphs, beginning with "Van Houten testified before the Board" and "Sometime the next day" are deleted and the following two paragraphs are inserted in their place:

On the evening of August 8 or early morning of August 9, 1969, and following Manson's instructions, Watson, Atkins, Krenwinkel, and Kasabian brutally murdered Sharon Tate Polanski, Voitcek Frykowski, Abigail Folger, Jay Sebring, and Steven Parent, subsequently referred to as the "Tate murders." (See *People v. Manson*, *supra*, 61 Cal.App.3d at pp. 131-132; *People v. Van Houten* (1980) 113 Cal.App.3d 280, 284.) The victims were trapped in or pursued through and about the Polanski residence and shot or clubbed or stabbed multiple times. (See *People v. Van Houten*, *supra*, 113 Cal.App.3d at p. 284; *People v. Manson*, *supra*, 61 Cal.App.3d at pp. 131-132.) The murderers returned to the ranch and reported to Manson. (*Id*. at p. 132.)

Sometime the next day, August 9, 1969, after Atkins and Krenwinkel returned, they told Van Houten that they had committed the Tate murders. Van Houten felt "left out" and wanted to be included next time. Manson approached Van Houten and asked her "if she was crazy enough to believe in him and what he was doing"

and Van Houten "said yes." After dinner that night, Manson told Van Houten and other members of the Family that the murders of the previous evening had been "too messy" and that he would show them how it should be done. (*People v. Manson*, *supra*, 61 Cal.App.3d at p. 227.)

(4) On page 10, on line 3 after the word "denial," add as footnote 4 the following footnote, which will require renumbering of all subsequent footnotes:

> [4]Although the standard of review does not call for a review of the entire record, considering the gravity of the case and out of an abundance of caution, we have reviewed the entire record in this case.

(5) On page 22, at end of first paragraph after the words "parole denial," add as footnote 9, the following footnote, which will require renumbering of all subsequent footnotes:

> [9]Van Houten criticizes this argument on several grounds in an otherwise helpful petition for rehearing.
>
> First, Van Houten contends that we are using her "minimizing responsibility" as a new unsuitability factor not among those listed in the statutes or regulations. (Pen. Code, § 3041, subds. (a), (b); § 2281, subds. (c), (d).) On the contrary, Van Houten's minimization of her responsibility supports the Board's determination that she is in need of further programming, meaning "institutional activities indicat[ing] an enhanced ability to function within the law upon release." (§ 2281, subd. (d)(9).)
>
> Second, Van Houten contends that using her minimization of her responsibility violates the rule against requiring an admission of guilt in a parole hearing. (Pen. Code, § 5011, subd. (b).) She argues, "A logical and reasonable reading of the statute is that it also forbids the Board from finding . . . Van Houten unsuitable because she refuses to admit to the prosecutor's version of the facts or to the Board's speculations and conjecture about what happened 35 years ago preceding and during the murders." Without commenting on this extension of the statute, we simply observe that Van Houten in her testimony did not contest the Board's version of events, nor was the Board punishing Van Houten for not admitting a version of the facts different from her testimony. Van Houten and the Board were in agreement about what occurred, and the Board was exploring Van Houten's attitude about what she admittedly did. Determining what

her attitude is toward her crimes is critical for deciding whether further counseling was needed to "enhance[] [her] ability to function within the law upon release." (§ 2281, subd. (d)(9).)

Finally, Van Houten contends that our construction of her testimony against her was unfair given her right to clarify to the Board the involvement and motivations of the participants in the murders. However, our function as a reviewing court is to review the record to see whether "some evidence" exists on which reasonable inferences can be made supporting the Board's findings and decision. (See *Rosenkrantz*, *supra*, 29 Cal.4th at pp. 658, 665, 677, 679.) The inferences we draw in the text from Van Houten's testimony are reasonable and support the Board's finding that Van Houten needed further counseling and should not be released at that time. (See § 2281, subd. (d)(9).)

(6) On page 24, the first full paragraph, beginning "Summarizing the factors" is deleted and the following paragraph is inserted in its place:

Summarizing the factors expressly found by the Board, all of which were supported by "some evidence," the negative factors included the heinous and cruel character of the crime, Van Houten's unstable social history, and her recent lack of involvement in various programs. (§ 2281, subds. (c)(1), (3), (d)(9).) The positive factors consisted of very good institutional behavior, favorable psychological evaluations, and realistic parole plans. (§ 2281, subds. (c)(5), (d)(8), (9).) A factor considered as it applied to Van Houten, but which did not appear to weigh heavily in the Board's decision either positively or negatively, was some nonviolent criminal activity while with the Manson family (see § 2281, subds. (c)(2), (d)(1), (6)), except as it may have been evidence of an unstable social history (§ 2281, subd. (c)(3)).

(7) In footnote 7 commencing on page 24, the last sentence (on pages 25 and 26) which begins "In Van Houten's case . . ." is deleted and the following sentence is inserted in its place:

In Van Houten's case the Board thoroughly discussed in its decision all of the relatively important circumstances concerning both suitability and unsuitability for parole.

(8) On page 20, line 8, replace section 2402, subd. (d)(5) (of the California Code of Regulations, title 15) with section 2281, subd. (d)(4).

(9) On pages 11 through 16, 19 through 20 and 24, replace section 2402 (of the California Code of Regulations, title 15) with section 2281.

Except for the modifications hereinabove set forth, the opinion previously filed remains unchanged. This modification does not effect a change in the judgment.

The petition for rehearing is denied.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

RICHLI
J.